No. 14688

United States
Court of Appeals
for the Ninth Circuit

NELSON EQUIPMENT COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES RUBBER COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For appellant:

VEATCH, BRADSHAW AND VEATCH;
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ROSENBERG, SWIRE & COAN;
MARVIN SWIRE,
710 Pittock Block,
Portland, Oregon.

In the United States District Court
for the District of Oregon

No. Civil 7177

UNITED STATES RUBBER COMPANY, a Corporation,

Plaintiff,

vs.

NELSON EQUIPMENT COMPANY, a Corporation,

Defendant.

COMPLAINT

Plaintiff alleges:

I.

That plaintiff is a corporation incorporated under the laws of the State of New Jersey and defendant is a corporation organized under the laws of the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

Defendant owes plaintiff $3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for merchandise sold and delivered by plaintiff to defendant between December 9, 1952, and February 17, 1953.

Wherefore, plaintiff prays for a judgment against the defendant for the sum of $3,387.96 with interest

at the rate of 6% per annum from February 17, 1953, until paid, and for plaintiff's costs.

ROSENBERG, SWIRE & COAN,

By /s/ MARVIN SWIRE,
Of Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed September 11, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations stated in paragraphs 1 and 2 of the complaint to the extent set forth in the counterclaim herein.

For counterclaim against plaintiff, defendant alleges:

1. That defendant is a corporation organized under the laws of the State of Oregon, and plaintiff is a corporation organized under the laws of the State of New Jersey. The amount in controversy in this counterclaim exceeds the sum of $3,000.00, exclusive of interest and costs.

2. On the 5th day of February, 1952, defendant was the authorized distributor for fire hose manufactured and sold by plaintiff in the states of Oregon, Washington and Idaho and the Territory of Alaska and on said day sold to the City of Seattle, Washington, 4,800 feet of fire hose to be delivered

by plaintiff to the fire department of said city and thereafter on the 17th day of April, 1952, defendant paid plaintiff the sum of $5,618.88 on account of said hose.

3. Plaintiff delivered said hose to said fire department in a damaged and defective condition and unsuitable for use for any purpose whatsoever and said fire department refused to accept the same.

4. Defendant returned said hose to plaintiff and plaintiff refused and still refuses to replace the same or to refund to defendant said sum paid by defendant to plaintiff.

Wherefore, defendant prays for judgment against plaintiff for the sum of $5,618.88 with interest at the rate of 6% per annum from the 17th day of April, 1952, less the sum of $3,387.96 with interest at the rate of 6% per annum from the 17th day of February, 1953, and for defendant's costs herein.

VEATCH, BRADSHAW & VEATCH,

/s/ JOHN C. VEATCH,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed October 1, 1953.

[Title of District Court and Cause.]

REPLY

Plaintiff, for reply to defendant's counterclaim, makes the following defenses:

First Defense

Defendant's counter-claim fails to state a claim upon which relief can be granted.

Second Defense

Plaintiff admits the allegations of Paragraph I and that it delivered to the Fire Department of Seattle, Washington, 4,800 feet of fire hose for which it received payment from defendant in the sum of $5,618.88, and that said hose was subsequently returned to plaintiff, and that plaintiff refused and refuses to replace same with other hose or to refund said sum. Except as herein expressly admitted, plaintiff denies generally and specifically each and every allegation contained in defendant's counter-claim and the whole thereof, and plaintiff alleges that it is presently holding said hose for defendant and subject to defendant's orders and instructions.

Third Defense

Defendant's order for said hose specified that it be inspected by United Laboratories, Inc., a corporation engaged in the business of inspecting and determining the quality of merchandise, and that defendant agreed that the determination of whether

said hose was of the quality called for by said order be made by said United Laboratories, Inc. That said corporation inspected said hose in accordance therewith and found the same of good and proper quality and applied its label thereto in evidence thereof, and that said hose in the condition as when so inspected was then delivered to the City of Seattle, Washington, in accordance with defendant's order.

Wherefore, plaintiff prays for judgment as demanded in its complaint.

ROSENBERG, SWIRE & COAN,

By /s/ MARVIN SWIRE,

Of Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1953.

[Title of District court and Cause.]

AGREED STATEMENT

Plaintiff, United States Rubber Company, is a New Jersey corporation, manufacturing and selling fire hose through a division known as "Eureka Fire Hose" which maintains a sales office in the City of New York, and a factory at Passaic, New Jersey, and is hereinafter referred to as "Eureka." Defendant, Nelson Equipment Company, is an Oregon corporation, with places of business at Portland, Oregon, and Seattle, Washington, and is hereinafter referred to as "Nelson."

In January, 1952, Nelson was Eureka's authorized distributor for fire hose in the states of Oregon, Washington, Idaho and the Territory of Alaska. As such distributor, Nelson would notify Eureka of advertisements for bids for fire hose and ask for bidding instructions. Sometimes Eureka would quote Nelson a bid price and a discount on such price and sometimes would quote an invoice price and allow Nelson to fix the bid price. When bids were accepted and the hose delivered to the customer, Nelson would pay Eureka the invoice price or the bid price less the discount, as the case might be, and bill the customer for the bid price.

In January, 1952, Nelson notified Eureka of a call for bids by the City of Seattle, for two lots of fire hose, one for 2½-inch and one for 3½-inch hose, and asked for bidding instructions. Eureka designated a bid price for the 3½-inch hose and quoted Nelson an invoice price for the 2½-inch and advised Nelson to fix the bid price. The city accepted Nelson's bid for both lots and the hose was subsequently shipped from Eureka's factory to the Seattle Fire Department and, upon receipt of the shipments, Nelson paid Eureka for both lots, the payment for the 2½-inch being the sum of $5,618.88, and billed the city for the bid price. The city subsequently rejected the 2½-inch hose for alleged defects and refused to pay Nelson the bid price and Nelson demanded of Eureka a replacement of the hose or a refund of the sum it had paid. The matter was under discussion over a period of several

months during which time Nelson became indebted to Eureka in the amount of $3,387.96 on other items for which Eureka billed Nelson monthly, and Nelson held up payment of these items pending a settlement of the hose claim. In September, 1953, Eureka commenced action against Nelson to collect the sum of $3,387.96 which indebtedness Nelson admitted but counter-claimed for the sum of $5,618.88, the amount it had paid Eureka for the rejected hose.

The case come on for trial before Honorable James Alger Fee who had just been appointed Judge of the United States Court of Appeals for the Ninth Circuit, and by stipulation of counsel, with the consent of the court, the testimony was taken without the presence of the court to be submitted to the court upon the pleadings, transcript of testimony, depositions and exhibits. Thereafter Honorable Claude McColloch, Chief Judge of the District Court for the District of Oregon, with consent of counsel, assigned the case to Honorable George H. Boldt, District Judge for the District of Washington, Western Division, then sitting as District Judge for the District of Oregon, for decision, who subsequently filed his decision, finding of fact, conclusions of law and entered judgment in favor of plaintiff and against defendant in the sum of $3,387.96, with interest thereon at the rate of 6 per cent per annum from the 17th day of February, 1953, and for costs and disbursements, from which judgment this appeal is taken, which decision, findings, conclusions of law and judgment are included as a part of this agreed statement.

Now, therefore, it is agreed that the exhibits, depositions and transcripts of testimony show the following facts essential to a decision on this appeal:

On February 5, 1952, the City of Seattle issued and delivered to Nelson its purchase order for 2½ inch fire hose in words and figures as follows, omitting printed matter:

2/5/52.

Nelson Equipment Co., Distributors,
Eureka Fire Hose,
3700 Airport Way,
Seattle, 4.

Ship to City of Seattle Fire Department,
301 2d Ave. S.

4,800 ft. Eureka 2½ inch double jacket rubber lined fire hose equipped with National Standard threads and Elkhart X—True couplings, each and every section to bear label of Underwriters' Laboratories, Inc.

4,800 ft.	$5,856.00
2%	117.12
Total	$5,738.88
State Tax	172.17
Total	$5,911.05

PAUL R. HENDRICKS,
Purchasing Agent.

This order is contingent on your filing a 5% performance bond.

Delivery by May 10, 1952.

This order was forwarded to Jonas R. Smith, Eureka's sales manager, at its office in the City of New York, who inquired whether Eureka or Nelson should furnish the performance bond and, upon being informed that Nelson would furnish the bond, acepted the order.

The hose was manufactured at Eureka's factory at Passaic, New Jersey, in sections of 50 feet each, and each and every section was tested and inspected by representatives of Underwriters' Laboratories and found to be satisfactory with the exception of one section which was rejected and a substitution made, and the Underwriters' labels were attached, and was packed in cartons to prevent chaffing or damage in shipment in accordance with the usual custom.

The hose was shipped from the factory on March 28, 1952, and on that day Eureka billed Nelson for its purchase price. It arrived at Seattle on April 8, 1952, and on April 17, 1952, Nelson paid Eureka the sum of $5,618.88, that being Eureka's invoice price, and billed the City of Seattle for $5,911.05, the bid price.

Robert B. Rogers, by deposition, testified that he is Assistant Chief of the Seattle Fire Department; that he has been in the department 44 years and has been assistant chief for the past 15 years; that the hose was received at fire department headquarters

at Station 10 on April 8, 1952, and remained there until approximately April 28, during which time the members of Engine Companies 1 and 10 and Ladder Company 1, under his direction, took the hose and examined it; that each section was laid out at full length on the floor and one man would pick up a section and run it through his hands and examine it for defects and then turn it over and repeat the process; that this is the same inspection made of all new hose; that no defects were found on this inspection. That in accepting bids the only factor considered was the amount, and that the purpose of requiring Underwriters' label on hose is to show that the hose was manufactured according to certain standards so that an analysis of each lot of hose is unnecessary and to insure uniformity in bids, as without this requirement bids would be for various prices without uniformity as to qualify; that the fire department rejects hose bearing the Underwriters' label when defects are found.

That, after this inspection, the hose was stencilled with lot and section numbers, and sections numbered 1 to 48, being 2,400 feet, were delivered to Engine Company 6 on April 29, 1952, and sections numbered 49 to 96 were delivered to Engine Company 18 on April 30, 1952. That on May 10, 1952, he received a call from the Battalion Chief in charge of Station 18 regarding the condition of the hose and he instructed the Chief to lay out some of the worst sections for inspection; that he inspected 16 sections of the hose on May 17, 1952, and found that there were holes through the jackets and the outer jackets were

frayed and in poor condition; that as a result of this inspection, 37 sections were returned to Nelson on May 27, 1952; that he saw the hose a few times after its return and on September 4, 1952, he was accompanied by a representative of the Underwriters' Laboratories and they inspected the 37 sections returned at Nelson's Seattle plant, together with the manager of the plant; that they made various tests to try to determine what was wrong with it, part of which were tests to determine the presence of acid, but were unable to find the cause of the defects; that in his opinion there was a latent defect in the fabric of the jackets which appeared all right but would not stand up; that good fire hose lasts from 10 to 15 years.

That he received no complaint of the 48 sections delivered to Engine Company 6 but, after the examination of the 37 sections at Nelson's plant on September 4, and a conference with a representative of the Purchasing Department and the representative of the Underwriters' Laboratories, they decided to have all the hose examined and on September 23, 1952, he sent Captain Steel of the Fire Department to inspect the lot delivered to Engine Company 6; that after this inspection and after much discussion with members of the Fire Department, the Purchasing Department and the representative of the Underwriters' Laboratories it was decided to reject the entire lot and the remainder of the hose was returned to Nelson's Seattle plant on January 23, 1953; that the reason for the rejection of the hose

was its poor condition; there were holes and frayed spots in the outer jackets; hose can have holes in the outer jackets and still maintain the pressure necessary to fight fires but such holes continue to grow and fray and finally there is a scuff on the inner jacket and then the hose bursts and instead of having a hose that would last from 10 to 15 years it may last but one year; when this hose was returned it was unfit for use as a fire hose.

The entire lot, save the 37 sections rejected and returned in May, was kept in service until January 23, 1953. The decision to reject the entire lot was based upon the inspection of September 23, and the defects in the 37 sections.

Clarence G. Steel, by deposition, testified that he is a former Captain in the Seattle Fire Department, having retired in March, 1953; that he was in charge of Engine Company 7 and on September 23, 1952, at the direction of Assistant Chief Rogers, he inspected 48 sections of the hose at Engine Company 6; that when he arived part of the hose was laid out on the floor and part was on the fire apparatus; that the hose that was defective was laid aside and that showing no defects was put back on the apparatus and the remainder on the apparatus was then removed and inspected; that the men at the station went over each section and called his attention to any defects found and that he recorded the numbers of the sections and the defects found; that the hose had the appearance of new hose but 22 sections had scuff

marks or breaks in the outer jackets and the coupling on one section looked like it was pulling out; that from this inspection he would say that for brand new hose there was something radically wrong with it; that 25 sections appeared to be all right and these sections were put back on the apparatus but none of the defective sections were put back; that he does not know what was done with the hose after his inspection and report.

Glen Anderson, by deposition, testified that he is a Captain in the Seattle Fire Department, has been with the department 26 years and has been a captain 9 years; that he has been in charge of Engine Company 18 since 1947; that when the 48 sections were delivered to his station it was apparently new hose; that there was considerable water in each length; that one-half of it was drained and put on the fire apparatus and the other half laid out and stenciled with the engine company number; then these sections were put on the apparatus and the other half taken off and stenciled and then hung in the drying tower where it remained until May 6, 1952, when it was taken down and the hose on the apparatus was taken off and hung up to dry and was replaced with the dry hose; that the second half was dry by May 9, 1952, and when taken out of the drying tower a number of breaks and frayed spots were noticed in the outer jackets; that none of the hose had been put in use up to that time as this company had had no fires; that he called his immediate chief and an inspection of all 48 sections was made on May 10,

and 37 sections were found defective and were later picked up by the commissary driver; that the 11 sections remaining were put back in use; that, generally speaking, hose up to five years in service is considered class A hose and there won't be any breaks through the outer jackets; that the damage observed in the 37 sections could not have occurred through the handling of the hose up to that time; that the 11 sections remaining were not picked up until January 23, 1953, and when picked up they had no breaks in the outer jackets and showed only normal wear; that all hose is dried because where water is left in it it will form a mild sulfuric acid but this usually occurs in old hose and does not affect new hose as a rule.

On May 28, 1952, Nelson notified Jonas R. Smith, sales manager of Eureka, of the defects found in the 37 sections of the hose and asked for instructions. On June 3, 1952, Smith advised Nelson to have the City of Seattle submit the complaint to the Underwriters' Laboratories and several sections of the hose were sent to the Laboratories for inspection. On November 7, 1952, Mr. Corbett, President of Nelson, wrote to Smith enclosing a copy of the Underwriters' report dated October 27, 1952, and notifying Smith that the City had rejected all of the hose and asking for instructions, but no reply was received. On November 26, 1952, Corbett wrote Smith asking for a reply to the letter of November 7, but no reply was received. On December 9, 1952, Corbett wired

Smith asking for a reply to the letter of November 7, but received no reply. On December 10, 1952, Smith wrote to Corbett cancelling Nelson's distributors contract but made no mention of the hose. On December 15, 1952, Corbett wrote Smith asking for an answer to the letter of November 7, but received no reply. On January 6, 1953, Corbett wrote Smith reminding him that Smith had promised in a telephone conversation to immediately take care of the hose problem and that nothing had been done and that the hose was held at Seattle awaiting Smith's instructions as to its disposition but received no reply. On January 16, 1953, R. E. Vadnais, manager of Nelson's Seattle plant, wrote to Smith reminding him that no answer had been made to previous correspondence; that the City of Seattle was demanding immediate replacement of all the hose; that Nelson had no alternative but to return the hose to Eureka and that it would be returned collect. No reply was received and the hose was returned by Nelson.

Jonas R. Smith, sales manager of Eureka, by deposition, testified that he had discussed the hose situation with Nelson both by correspondence and telephone; that he had at least four and possibly five telephone conversations with Corbett between approximately July 15, 1952, and January 15, 1953; that he told Corbett that, since the hose had been manufactured according to the Underwriters' specifications and had been thoroughly tested by the Underwriters, the City of Seattle should take the matter up with the Underwriters; that Corbett had

told him that Eureka should replace the hose and he told Corbett that Eureka could not do that until the factory had a chance to examine the hose and see whether it was defective or whether it had been damaged by the customer and that the usual procedure was to ship the hose to the factory, collect, for examination and report; that the hose arrived at Eureka's New York office on March 10, 1953, charges collect; that Eureka had had no notice from Nelson to expect the hose; that he had never agreed to replace the hose for Nelson and had never agreed to accept the hose and issue a credit.

Scott S. Corbett, President of Nelson, testified that he had but one telephone conversation with Smith; that Nelson keeps a record of outgoing telephone calls which shows that this conversation occurred on December 18, 1952; that in the conversation he reviewed his previous letters to Smith and told Smith that Nelson would either have to have a replacement of the hose or a refund of the purchase price by Eureka; that Smith said he would take care of it; that Smith never asked him to return the hose for inspection and never refused to accept the hose when it was returned; that he never knew what happened to the hose after its return until he saw the deposition of Mr. Hellegers in this case; that when the first 37 lengths of hose were returned the City did not cancel the purchase order but simply demanded a replacement of the defective hose; that Nelson was endeavoring to keep the purchase order

open until instructions could be received from Eureka.

That the Underwriters' Laboratories label on hose simply means that it was manufactured according to certain minimum standards; that Nelson sells an average of 120,000 to 150,000 feet of fire hose a year; that about 40 per cent is Underwriters' standard and 60 per cent "grade" hose which is a higher standard than the Underwriters; that two lots of Eureka hose were ordered by the City at the same time and no defects were found except in this lot.

R. E. Vadnais, manager of Nelson's Seattle branch, testified that when the 37 lengths of the hose was returned he requested the fire department to keep the other sections and use them until Nelson could hear from Eureka and learn what he could or could not do but was finally told by the purchasing department of the City that the fire department needed the hose and that the whole lot would have to be replaced and he then returned the hose to Eureka.

Walter Hellegers, Claims Manager of Eureka's factory at Passaic, New Jersey, testified that he has been in Eureka's employ since 1911, and chief inspector at the Passaic plant until 1947; and claims manager since that time; that the Passaic plant manufactured various articles besides fire hose; that his duties consist in examining articles returned by customers for the purpose of determining whether the customer is entitled to credit for defects in manufacture; that he does not come in contact with

Eureka's customers but complaints go to the sales department which refers the matter to the claims department which examines the article to determine whether there were defects in manufacture; that the hose involved in this case is 2½ inch rubber lined fire hose with two cotton outer jackets which are woven on looms inspected twice daily and from yarn pre-tested in Eureka's textile laboratory; that the jackets when finished are inspected and the rubber tube then inserted in the jackets and the completed hose is then subjected to a hydrostatic pressure of 400 pounds per square inch to determine if there are any defects in the hose; that if there are any defects in the jackets, the cotton threads would snap under the pressure. If the hose is sold under the Underwriters' label, it is then turned over to the Underwriters' inspectors who subject it to various tests which include hydrostatic pressure test, a burst test, a kink test, a test pertaining to elongation, a twist test, a warp and rise test, a test as to thickness of lining, an adhesion test of the lining, a physical test of the lining and an accelerated aging test. All of the sections of the hose shipped to Seattle were subjected to these tests and but one section was found defective which was replaced.

That the returned hose arrived at the Passaic plant on February 11, and was inspected between that date and February 16, 1953; that the hose was dirty and the threads in the jackets were abraided and scuffed and in these areas the hose was dirty indicating it had come in contact with foreign ob-

jects; that if the damage had been due to defects in the cotton jackets the breaks would have been clean breaks but instead the damage consisted of tears in individual strands of each yarn indicating that it was only from wear as the result of the hose rubbing against another object; that a report of the examination was made to the sales department on February 16, 1953, and on that day a written request was made to Underwriters' Laboratories, Inc., for an inspection and the sales department notified of such request and, on or about April 10, 1953, a Mr. McNab, a representative of the Underwriters' Laboratories, made an inspection.

That all but 12 or 13 lengths of the hose returned showed damage and when returned it was unsuitable for use as fire hose; that with good care fire hose should last the average City several years; that after the hose was returned no tests were made of the fabric in the jackets; that his only purpose in making the tests was to determine if there were defects in manufacture and whether the claim should be charged to the factory or the sales department; that he held the hose until August, 1953, when he transferred it to Eureka's Bergen warehouse about 12 miles away where it is now located; that his purpose in holding it was awaiting instructions from the sales department as to its disposition; that he had no contact with the customer as that is the business of the sales department; that he did not hold the hose for any purpose of Nelson, but he held it and put it in a warehouse as customers' property.

Raymond W. McNab, by deposition, testified that he is employed by the Underwriters' Laboratories, Inc., and made an inspection of the hose at Eureka's plant on March 13, 1953; that all but 13 of the 96 sections of hose showed damage in the outer jackets; that the hose was dirty and scuffed and each hold in the fabric was surrounded by a dirty ring making it apparent that the damage was caused by external action.

Clarence Hessey, by deposition, testified that he is the inspector for Underwriters' Laboratories, Inc., who inspected the hose before shipment to Seattle; that he inspected 99 sections out of which 96 sections were included in the shipment; that he found 98 sections satisfactory and rejected one section for defects in the cotton jacket.

Statement of Points

The defendant-appellant in presenting this appeal will rely upon the following points:

1. That the court erred as a matter of fact in finding that defendant and the City of Seattle relied upon the inspection of the Underwriters' Laboratories, Inc., in determining the quality and fitness of the hose.

2. That the court erred as a matter of fact in finding that plaintiff accepted and retained the returned hose for inspection only.

3. That the court erred as a matter of law in holding that there were no implied warranties in the sale of the hose.

4. That the court erred as a matter of law in holding that plaintiff did not agree to a rescission of the sale by accepting and retaining the hose.

5. That the court erred in entering judgment in favor of plaintiff and against the defendant.

Dated this 7th day of March, 1955.

/s/ JOHN C. VEATCH,
Of Attorneys for Defendant-Appellant.

/s/ MARVIN SWIRE,
Of Attorneys for Plaintiff-Respondent.

Approved this 7th day of March, 1955.

/s/ GEO. H. BOLDT,
District Judge.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Cause.]

DECISION

The case has been submitted on the pretrial order, depositions, transcript, exhibits and trial memoranda, all of which have been read and fully considered.

Inasmuch as the Invitation to Bid, defendant's bid and Seattle's acceptance thereof were all expressly predicated on the specification of hose

labeled by Underwriters' Laboratories, Inc., which labeling, as was well known and understood by all parties, could only be procured through the inspection and tests provided for in the Underwriters' brochure entitled "Standard for Cotton Rubber-Lined Fire Hose," I am of the opinion that in the absence of fraud such labeling following such testing as to the quality of the hose was conclusive on all concerned. Acordingly, there was no implied warranty involved in the sale as a matter of law. Defendant refers to no authorities contrary to the cases to such effect cited in plaintiff's memoranda and in the 46 ALR 864 annotation.

If it were assumed that a warranty of fitness for the use intended arose by implication, the burden would rest on defendant to establish by a preponderance of the credible evidence that at the time of delivery to the Seattle Fire Department the hose in fact was defective and unsuited for its intended use. In my opinion the defendant has not met such burden and the evidence preponderates to the contrary. I am satisfied that the hose was fully and properly tested and in nondefective condition at the time of its shipment direct from the factory to the Seattle Fire Department. Defendant's own proof shows that immediately following arrival at Seattle the hose was examined by the purchaser and no visible defect or damage found therein. The scuffings and abrasions later found on the hose and couplings occurred during the period the hose was in the possession of the Seattle Fire Department.

Admittedly the hose was handled by Seattle firemen in the stations, on engines and in a drying tower. It seems incredible to me that damage of the type and extent shown in the photographs and described in the evidence could have been caused in any other manner than by rough handling and/or improper stowage during the period the hose was in Seattle when at all times it was in possession of the Seattle Fire Department. To say the least, the evidence does not preponderate against such a finding. The only other evidence pertaining to the condition of the hose following delivery is that shown by the fire department tests for acid reaction which were negative.

Defendant cannot claim a rescission of its purchase contract from plaintiff unless the City of Seattle had a right to rescind as against defendant. Vanderpool v. Burkitt, 113 Ore. 656. As above found, the City of Seattle had no such right and I do not find anything in the record to sustain defendant's contention that plaintiff voluntarily agreed to rescission by receiving the hose for factory inspection when shipped by defendant after rejection by the City of Seattle. I do not interpret any evidence in the record, or inference therefrom, to justify such a finding.

Defendant admits that it has owed plaintiff $3,387.96 since February 17, 1953 for merchandise purchased from and delivered by plaintiff. The evidence not sustaining defendant's counterclaim, the

same will be dismissed and plaintiff will take judgment in the sum referred to with interest from the date indicated.

Findings, conclusions and judgment in accordance herewith may be prepared, served and forwarded to the Court by mail for signature.

Dated at Tacoma, Washington, this 10th day of November, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed November 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been duly and regularly submitted for trial to the Honorable George H. Boldt, Judge of the above-entitled Court, on the pretrial order, depositions, exhibits, trial memoranda and transcript of witnesses' testimony, and the Court having duly considered the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

Plaintiff is a corporation, incorporated under the laws of the State of New Jersey, and defendant is a corporation, incorporated under the laws of the State of Oregon.

II.

Between September 9, 1952, and February 17, 1953, plaintiff sold and delivered to defendant merchandise of the value of $3,387.96, due on or before February 17, 1953.

III.

No part thereof has been paid.

IV.

On or about February 8, 1952, defendant ordered from plaintiff 4,800 feet of fire hose bearing Underwriters' Laboratories, Inc., inspection labels, to be shipped to the Fire Department of the City of Seattle, Washington, to fill a like order which defendant had received from the Fire Department of the City of Seattle, Washington.

V.

The agreed purchase price for the sale of the hose from plaintiff to defendant was $5,618.88, and defendant paid said sum to plaintiff on or about April 17, 1952.

VI.

In placing said orders, both the City of Seattle and the defendant relied on the inspections and tests to be made by Underwriters' Laboratories, Inc., for the purpose of determining the quality and fitness of the hose.

VII.

On or about March 26, 1953, plaintiff shipped to the City of Seattle 4,800 feet of fire hose which

had been tested, inspected and approved by inspectors of Underwriters' Laboratories, Inc., and to which were affixed the labels of Underwriters' Laboratories, Inc., all pursuant to and in compliance with the terms of the purchase order of the City of Seattle to defendant and of the purchase order of defendant to plaintiff.

VIII.

The hose was free of defects and was suitable for its intended use at the time it was received by the City of Seattle on or about April 8, 1952.

IX.

In January, 1953, defendant returned the hose to plaintiff, who accepted and retained same for inspection and examination only.

Based thereon, the Court makes the following:

Conclusions of Law

I.

The Court has jurisdiction of the parties and of the cause, based upon diversity of citizenship of the parties and on the amount in controversy herein, being in excess of $3,000.00, exclusive of interest and costs.

II.

Defendant is indebted to plaintiff in the sum of $3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for merchandise sold and delivered by plaintiff to defendant between December 9, 1952, and February 17, 1953.

III.

There were no implied warranties in the sale of the fire hose shipped by plaintiff to the City of Seattle on or about March 26, 1952.

IV.

Plaintiff did not agree to a rescission of the fire hose sale by accepting and retaining the hose when it was returned to plaintiff by defendant in January, 1953.

V.

Defendant is not entitled to rescind its purchase of said fire hose from the plaintiff.

VI.

Plaintiff is entitled to a judgment herein against defendant for the recovery of $3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, for a dismissal of defendant's counterclaim, and for the recovery of plaintiff's costs and disbursements necessarily incurred.

Dated this 26th day of November, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to form as being in accordance with the written decision of the Court.

November 23rd, 1954.

/s/ JOHN C. VEATCH,
Attorney for Defendant.

[Endorsed]: Filed November 29, 1954.

In the United States District Court
for the District of Oregon

No. Civil 7177

UNITED STATES RUBBER COMPANY, a Corporation,

Plaintiff,

vs.

NELSON EQUIPMENT COMPANY, a Corporation,

Defendant.

JUDGMENT

The trial of the above-entitled cause having been duly, regularly and agreeably submitted to the Honorable George H. Boldt, Judge of the above-entitled Court, on the pretrial order, depositions, exhibits and trial memoranda, and upon the written transcript of the testimony of witnesses taken on March 24, 1954, before and pursuant to the directions of the Honorable James Alger Fee, then a Judge of the above-entitled Court, and the Honorable George H. Boldt, having fully considered all said matters and having made and filed his memorandum decision, findings of fact and conclusions of law, all in favor of plaintiff, now, pursuant thereto, it is hereby

Ordered and Adjudged that plaintiff have and recover judgment against defendant in the sum of $3,387.96 with interest thereon at the rate of 6% per annum from February 17, 1953, until paid, and for plaintiff's costs and disbursements incurred

herein to be hereafter taxed in the manner provided by law.

It Is Further Ordered and Adjudged that defendant's counterclaim be and the same is hereby dismissed upon the merits and defendant taking nothing thereby.

Dated this 26th day of November, 1954.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed November 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Nelson Equipment Company, a Corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 29th day of November, 1954.

/s/ JOHN C. VEATCH,
Attorney for Appellant.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Sept. 11—Filed complaint.
Sept. 11—Issued summons—to marshal.
Sept. 17—Filed summons with marshal's return.
Oct. 1—Filed answer.
Oct. 20—Filed reply.

1954

Feb. 8—Entered order setting for pre-trial conference March 15 and trial March 18, 1954.
Feb. 15—Filed deposition of Clarence Hessey for plntf.
Feb. 23—Filed depositions of Joseph Sipos, John A. Brady and Walter Hellegers.
Mar. 15—Filed depositions of Robert B. Rogers, Clarence G. Steele and Glen Anderson.
Mar. 15—Entered order resetting for pre-trial conference March 17.
Mar. 17—Entered order resetting for pre-trial conference March 18.
Mar. 18—Entered order resetting for pre-trial conference and trial March 24.
Mar. 22—Filed deposition of Jonas R. Smith for plntf.
Mar. 24—Filed stipulation for taking of deposition of Jonas R. Smith.
Mar. 24—Filed stipulation of facts.
Mar. 24—Filed plntf.'s trial brief.
Mar. 24—Filed and entered pre-trial order.

1954

Mar. 24—Record of trial, order allowing reasonable time for briefs.

Apr. 6—Filed defendant's trial brief.

Apr. 6—Filed exhibits 1 to 62.

Apr. 16—Filed plaintiff's reply memorandum.

Apr. 16—Filed transcript of proceedings 3-24-54.

Apr. 18—Entered order taking under advisement.

Nov. 11—Filed decision of court.

Nov. 29—Filed and entered Findings of Fact and Conclusions of Law.

Nov. 29—Filed and entered Judgment for plaintiff ($3,387.96).

Nov. 29—Entered judgment in lien docket.

Dec. 3—Filed cost bill and notice of taxation.

Dec. 27—Filed notice of appeal by defendant and copy mailed to plaintiff's attorneys.

1955

Jan. 4—Filed supersedeas bond on appeal.

Feb. 7—Filed motion for order extending to March 10, 1955, time to file and docket appeal.

Feb. 7—Filed and entered order extending to March 10, 1955, time to file and docket appeal.

Mar. 8—Filed agreed statement.

Mar. 9—Filed designation of record on appeal.

Mar. 9—Entered order extending time to March 19, 1955, to file and docket appeal.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of complaint, answer, reply, agreed statement, decision, findings of fact and conclusions of law, judgment, notice of appeal, supersedeas bond on appeal, orders extending time, designation of contents of record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7177, in which the United States Rubber Company is plaintiff and appellee, and the Nelson Equipment Company is defendant and appellant; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of March, 1955.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14688. United States Court of Appeals for the Ninth Circuit. Nelson Equipment Company, a Corporation, Appellant, vs. United States Rubber Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed March 11, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.